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No. 81-137

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES J. DONOHUE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner seeks review of the decision below holding him in contempt for refusing to comply with a grand jury subpoena and ordering him incarcerated until such time as either he should purge himself of his contempt or the grand jury term should expire.

1. The pertinent facts may be summarized as follows: In response to an October 29, 1979, grand jury subpoena directed to petitioner in his capacity as custodian of corporate records, petitioner produced certain documents of his wholly-owned corporation, James J. Donohue Associates, Inc., and was given a signed receipt for the items tendered. By letter dated October 20, 1980, he was requested to produce his diaries for 1973 through 1979. He voluntarily produced his 1979 diary, but asserted that he had already produced the 1973 through 1978 diaries and offered as proof of his production a copy of the previously given receipt, which listed those diaries as the final entry (Item

20). However, the copy of the receipt retained by the grand jury contained only 19 items (Pet. App. 2a-3a). Accordingly, a subpoena was issued directing petitioner to produce the original and all copies of the November 1979 receipt.[1] Petitioner filed a motion to quash the subpoena and refused to respond to questions about the receipt before the grand jury, claiming his Fifth Amendment privilege (Pet. App. 1a). At a hearing before the district court, petitioner contended that the receipt was a personal record and therefore encompassed by his Fifth Amendment privilege against self-incrimination. The district court rejected petitioner's claim. It found that the receipt was a corporate record of which petitioner was a custodian and that it was not protected by petitioner's personal Fifth Amendment privilege (Pet. App. 4a-6a).

In light of the district court's holding, a new subpoena was issued requiring petitioner to appear before the grand jury on February 26, 1981, and to produce the receipt. In response to the new subpoena, petitioner appeared before the grand jury and asserted that he had never received the original receipt. This testimony, repeated in open court at a contempt hearing and contradicted by the government's evidence, was not believed by the district court. On the basis of all the evidence before it, including testimony by petitioner's attorney, the court ruled petitioner's testimony to be "without credibility" (Pet. App. 20a) and held him in civil contempt (*id.* at 14a-22a).

Petitioner appealed from the contempt order, raising several issues with respect to the ruling on his credibility and

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[1]The first subpoena also commanded petitioner to produce the 1973 through 1978 diaries. The district court held the diaries were personal records, the compelled production of which would violate petitioner's privilege against self-incrimination, and, accordingly, refused to order them produced (Pet. App. 11a).

the procedures followed by the district court. The court of appeals affirmed (Pet. App. 23a-24a). It held that the district court's finding that " 'there is clear and convincing evidence * * * that [petitioner] does possess the original receipt' " was not clearly erroneous.

2. Petitioner seeks (Pet. 6, 10) review by this Court of the decision below to consider the scope of the Fifth Amendment's protections against compulsory production of "non-business" (*i.e.*, personal) records in the claimant's possession and to determine the limits of the privilege under *Fisher* v. *United States*, 425 U.S. 391, 398 (1976), when the existence of a subpoenaed document is in dispute. His arguments supporting these contentions are premised on the assumption that the subpoenaed receipt is a personal record and that its existence is in doubt. The district court, however, correctly determined the receipt in question to be a corporate record that was not subject to the protections of the corporate officer's personal claim of privilege, and it rejected petitioner's unsupported assertion that he never received the receipt. These findings are supported by the record (Pet. App. 4a-6a, 18a-22a), and review by this Court of these factual issues is unwarranted.

Contrary to petitioner's assertion (Pet. 6-10), any conflict that may exist between *In re Grand Jury Proceedings United States*, 626 F. 2d 1051, 1056 (1st Cir. 1980), and *United States* v. *Davis*, 636 F. 2d 1028, 1041 (5th Cir. 1981), is not implicated by the decision below. Unlike here, in both those cases, it was established as a factual matter that the claimant of the privilege was, or might have been, incriminated by the testimonial aspects of producing *personal* papers. Indeed, the First Circuit in *In re Grand Jury Proceedings United States* explicitly recognized that a custodian of corporate records, such as petitioner, could not assert a Fifth Amendment privilege with respect to those records (626 F. 2d at 1056). The decision below followed

the well-established rule that the testimonial aspects of authentication and identification inherent in producing corporate documents are unprivileged, because they are ancillary to the production of the documents (*Curcio* v. *United States*, 354 U.S. 118, 125 (1957)), and thus not "deemed to be sufficiently testimonial for purposes of the privilege" (*Fisher* v. *United States, supra*, 425 U.S. at 410-411). See *Bellis* v. *United States*, 417 U.S. 85 (1974).[2]

3. Finally, petitioner contends (Pet. 10-11) that his incarceration was inappropriate under 28 U.S.C. 1826 because he had shown just cause by giving testimony, subject to cross-examination, that he never received the document in question. That statute permits summary incarceration for civil contempts "[w]henever a witness * * * refuses without just cause shown to comply with an order of the court" to produce subpoenaed records. The district court found (Pet. App. 20a), however, that petitioner's testimony in this regard was "without credibility." Indeed, just cause for failing to comply with a subpoena cannot be shown by the contemnor's "own denials which the court finds incredible in context." *Maggio* v. *Zeitz*, 333 U.S. 56, 75-76 (1948). Accordingly, 28 U.S.C. 1826 does not divest the trial court of its authority and responsibility to consider the credibility of a witness.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1981

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[2]Accordingly, petitioner's factual objection (Pet. 9-10) to the district court's alternative holding that production of the receipt would not be testimonial does not warrant review because the finding that the subpoenaed receipt is a corporate record is dispositive.

DOJ-1981-09